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In the Supreme Court of the United States

OCTOBER TERM, 1982

FORT BELKNAP INDIAN COMMUNITY, GROS VENTRE AND ASSINIBOINE TRIBES, A TRIBAL GOVERNMENT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the former Court of Claims had jurisdiction to entertain a claim for money damages against the United States for alleged breach of the government's duty under 25 U.S.C. 81 to protect petitioner from entering into disadvantageous business agreements with third parties.

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OPINION BELOW

The opinion of the former Court of Claims (Pet. App. A-2 to A-10) is unreported.

JURISDICTION

The judgment of the former Court of Claims was entered on August 6, 1982 (Pet. App. A-2). The petition for a writ of certiorari was filed on November 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. Petitioner is comprised of the Gros Ventre and Assiniboine Tribes and is organized pursuant to the Indian Reorganization Act. 25 U.S.C. 476. In the early 1970's petitioner undertook several construction projects through its wholly owned subsidiary, Fort Belknap Builders. A loan of $350,000 was obtained by petitioner in April 1970, from the Montana Bank of Circle, N.A., after the Bureau of Indian

Affairs (BIA) agreed to lease office space in one of the petitioner's buildings. The construction projects, however, were largely unsuccessful, and petitioner defaulted on its loan obligations.

2. On August 14, 1981, petitioner filed the present action in the Court of Claims, alleging that the United States breached its lease agreement and violated various fiduciary duties owed to petitioner. With regard to the latter claims, petitioner alleges that a trust relationship exists between the United States and petitioner and that petitioner may recover money damages for breach of the government's fiduciary obligations pursuant to the trust relationship.[1]

3. The Court of Claims granted the government's motion to dismiss all of the petitioner's claims for breach of fiduciary duty on the ground that petitioner failed to state a claim within the jurisdiction of the Court. Pet. App. A-5.[2] Relying on this Court's decisions in *United States* v. *Testan*, 424 U.S. 392 (1976), and *United States* v. *Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), the Court of Claims held that it lacked jurisdiction over claims for breach of fiduciary duty in the absence of a waiver of sovereign immunity

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[1]In particular, petitioner claims that the United States breached its fiduciary duty by 1) failing to investigate the persons contracted by petitioner to manage the construction projects, 2) failing adequately to assist petitioner with its financial negotiations, 3) failing to inform petitioner and take appropriate action after discovering the mismanagement and jeopardy of the construction projects, 4) failing properly to supervise and evaluate the construction projects, 5) failing to make required contract payments, and 6) drafting contract specifications impossible of performance (Pet. 11-13).

[2]The Court of Claims denied the government's motion to dismiss with regard to the claim for breach of the office lease and remanded the claim to the trial division for further proceedings. Pet. App. A-4 to A-5, A-10.

evidenced in a statute or regulation mandating compensation by the government for damages sustained. Pet. App. A-5 to A-10. The Court of Claims rejected petitioner's reliance on 25 U.S.C. 81, which requires government approval of Indian contracts with third persons,[3] holding that the statute, although "designed to protect Indians by subjecting their contracts with third persons to * * * prior examination and approval * * *," nevertheless fell short "of the 'clear or strong' [*Inupiat Community of Arctic Slope* v. *United States*, 680 F.2d 122, 130 (Ct. Cl.), cert. denied, No. 82-359 (Nov. 1, 1982)] Congressional intent required to create a fiduciary duty by the United States to oversee and manage a tribe's contractual relations, for the breach of which the United States must respond in damages" (Pet. App. A-8 to A-9).

ARGUMENT

The decision of the Court of Claims represents the application of settled law to the facts of this case, and does not conflict with any decision of this Court or any court of appeals.[4] Accordingly, further review by this Court is not warranted.

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[3] 25 U.S.C. 81 provides in part that "[n]o agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money * * * unless such contract or agreement * * * shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it."

[4] In reaching its result, the Court of Claims was guided by its own decision in *Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981), cert. granted, No. 81-1748 (June 7, 1982) ("*Mitchell II*"), as well as by *Mitchell I*. The United States sought certiorari in *Mitchell II* because the Court of Claims employed an improperly lax standard in determining that the statutes there involved authorized recovery of damages against the United States. There is no need to defer disposition of the present case pending the final disposition of *Mitchell II*, however, because the decision below rests upon, and is consistent with the Court of Claims' decision in *Mitchell II*.

1. Petitioner's chief argument concerns the circumstances necessary for an Act of Congress to give rise to a claim for damages under the Tucker Act, 28 U.S.C. (Supp. V) 1491.[5] In *United States* v. *Testan, supra*, this Court held that a federal statute creates a substantive right to money damages, necessary for jurisdiction, only if it " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " 424 U.S. at 400 (quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). In *Mitchell I, supra*, 445 U.S. at 538-539, this Court made clear that the jurisdictional requirements enunciated in *Testan* apply equally to Indian claims under 28 U.S.C. (Supp. V) 1491, and similarly that, in an action on behalf of a Tribe brought pursuant to 28 U.S.C. 1505, there must likewise be a waiver of sovereign immunity, which cannot be implied but must be unequivocally expressed. In the absence of such a clear congressional consent, the Court of Claims has no jurisdiction to entertain a suit against the United States. The Court found that Congress, in passing the General Allotment Act, 25 U.S.C. 331-358, created only a limited trust relationship and did not impose any fiduciary duty on the government for the management of timber resources. 445 U.S. at 542.

Petitioner contends (Pet. 24-25) that the requirement of *Mitchell I* that a federal statute, in order to constitute a waiver of sovereign immunity, must at least "unambiguously provide that the United States has undertaken full

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[5]The Tucker Act provides in pertinent part that

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. • • •

fiduciary responsibilities," 445 U.S. at 542, is "at odds" with the "plain meaning" canon of construction and the rule that statutes intended to benefit Indians are to be liberally construed in the Indians' favor. This contention is meritless. It is without question that a waiver of immunity " 'cannot be implied but must be unequivocally expressed,' " *Mitchell I, supra*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)), and, under these circumstances, the canons of construction referred to by petitioner clearly cannot overcome the conclusion of the Court of Claims that 25 U.S.C. 81 does not impose fiduciary duties upon the government the breach of which mandates compensation and thus provides a basis for jurisdiction.[6]

Petitioner additionally argues (Pet. 29, 35-36) that the Court of Claims failed properly to apply the analysis set forth in its own decision in *Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981), cert. granted, No. 81-1748 (June 7, 1982) ("*Mitchell II*").[7] In *Mitchell II* the Court of Claims held that certain statutes,[8] other than the General Allotment Act, which concern the federal management of Indian forests and lands, created fiduciary obligations under

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[6]The fact that the government admitted to the existence of a general trust relationship with petitioner (Pet. 33) in a related case, *Montana Bank of Circle, N.A.* v. *United States*, No. 328-77 (Ct. Cl. Oct. 6, 1978), does not bear upon the issue of whether a breach of a fiduciary duty owed under 25 U.S.C. 81 mandates compensation and is within the jurisdiction of the Court of Claims.

[7]As previously noted, it is the position of the United States that the Court of Claims' *Mitchell II* decision employs an erroneous standard for determining whether a federal statute grounds a claim for damages against the United States. If we are right in that submission any "error" in the instant case favored petitioner.

[8]The statutes involved were 25 U.S.C. 406-407; 25 U.S.C. 466; and 25 U.S.C. 318a, 323-325.

which claims for money damages for breach may be brought. The court summarized its analysis as follows:

> The common thread of the statutes we have just construed as contemplating compensation to the Indians is that they all (a) deal with Indian-owned property, (b) directed to be managed or controlled by federal officials as fiduciaries, (c) in the express interest of and for the benefit of the Indians, and (d) from which Congress clearly wanted the Indians to obtain the financial benefits.

644 F.2d at 273. Even under this expansive view of the availability of a cause of action for damages against the United States for alleged statutory violations, petitioner's claim for damages founded on 25 U.S.C. 81 clearly must fail.

It is manifest that 25 U.S.C. 81 does not direct federal officials to manage or control Indian-owned property. As the Court of Claims indicated (Pet. App. A-8), the statute does not place the United States in a position of overseeing and managing every aspect of tribal contractual relations. By contrast, in *Mitchell II* the Court of Claims found that the management and control of the government over Indian forest land was "comprehensive" and involved "day-to-day" supervision by the Bureau of Indian Affairs." 664 F.2d at 269 (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145 (1980)).[9] In addition, in *Mitchell II* the court stressed that the statutes involved were enacted for the specific purpose of assuring that the forests be

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[9]The relevance of pervasive federal management and control is also reflected in this Court's decision in *Mitchell I*. There the Court concluded that the General Allotment Act created only a limited trust relationship, noting that under that statute the Indian allottee, and not the government, was responsible for managing the land. 445 U.S. at 542-543. See also *Hydaburg Cooperative Association* v. *United States*, 667 F.2d 64, 68-69 (Ct. Cl. 1981), cert. denied, No. 81-6812 (Oct. 12, 1982).

managed so as to continually obtain the maximum revenue obtainable for the Indians consistent with proper maintenance of the forests. 664 F. 2d 271-273. The intent of Congress in passing 25 U.S.C. 81, however, was "to protect Indians by subjecting their contracts with third persons to the prior examination and approval of the Secretary of the Interior and the Commissioner of Indian Affairs" (Pet. App. A-8, citing H.R. Rep. No. 2449, 85th Cong., 2d Sess. 1 (1958)). Congress did not intend to thrust the Bureau of Indian Affairs into a comprehensive, day-to-day supervisory role under 25 U.S.C. 81.[10]

The Court of Claims' decision does not conflict with this Court's decision in *Mitchell I*, nor does it conflict with the analysis set forth in *Mitchell II*. Even under the *Mitchell II* analysis, it is clear that 25 U.S.C. 81 cannot be fairly interpreted as mandating money compensation for breaches of fiduciary obligations so as to constitute a waiver of sovereign immunity.

2. Petitioner also argues (Pet. 19-22, 38-40) that the language in the Tucker Act granting jurisdiction to the Court of Claims over claims "for liquidated or unliquidated damages in cases not sounding in tort * * *," 28 U.S.C. (Supp. V) 1491, constitutes a waiver of sovereign immunity. This argument, however, was not addressed to the Court of

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[10]In *Hydaburg Cooperative Association* v. *United States*, 667 F.2d 64 (Ct. Cl. 1981), cert. denied, No. 81-6812 (Oct. 12, 1982), the Court of Claims invoked similar reasoning to find that 25 U.S.C. 470, which establishes a revolving loan fund "for the purpose of promoting the economic development of [chartered Indian] tribes," does not impose a fiduciary duty on the United States "to promote the commercial success of borrowing Indians." 667 F. 2d at 68. Additionally, the court held that 25 U.S.C. 470 did not impose a duty to ensure that "assets and enterprises acquired by the Indians pursuant to the [Indian Reorganization] Act will continue to operate." 667 F. 2d at 68.

Claims by petitioner and consequently should not be considered by this Court. See *Mitchell I, supra*, 445 U.S. at 546 n.7.[11] In any event, this Court clearly held in *Mitchell I* that individual Indian and tribal claimants must look beyond jurisdictional statutes such as the Tucker Act and the Indian Claims Commission Act, 28 U.S.C. 1505, for a right of action in damages against the United States. 445 U.S. at 538-539. Likewise, in *Inupiat Community of Arctic Slope v. United States*, 680 F.2d 122, 132 (Ct. Cl.), cert. denied, No. 82-359 (Nov. 1, 1982), the Court of Claims held that the language in question does not provide a basis for jurisdiction "unless there also is a statute or a valid regulation mandating the payment of money."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]The Court of Claims in *Mitchell II* also declined to address the effect of the language in 28 U.S.C. (Supp. V) 1491, giving jurisdiction over claims against the United States for "liquidated or unliquidated damages in cases not sounding in tort," noting that the plaintiffs, like the petitioner in the instant case, chose not to rely on that clause but rather on specific legislation as founding their claims. *Mitchell II, supra*, 664 F. 2d at 270 n.7.